Supreme Court, U.S.
FILED

09-740 DEC 21 2009

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No. 09-__

IN THE
Supreme Court of the United States

ANTOINE HILL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner was arrested, interrogated without *Miranda* warnings, and two hours later interrogated again after being issued *Miranda* warnings. During both rounds of questioning, petitioner responded with incriminating statements. The only explanation given for why *Miranda* warnings were not issued during the first interrogation was a general need for "officer safety"—although the officer could not identify any exigent threat requiring the immediate need for questioning. The court of appeals below countenanced both the application of the public safety exception and the question-first-warn-later interrogation tactic, and in doing so, exacerbated conflicts among lower courts on two important issues involving *Miranda v. Arizona*, 384 U.S. 436 (1966).

The questions presented are:

I. Whether the narrow public safety exception under *New York v. Quarles*, 467 U.S. 649 (1984), can be applied to situations where a general threat to officer safety exists, but no exigent circumstances.

II. Whether the *Missouri v. Seibert*, 542 U.S. 600 (2004), plurality multi-factor objective test applies to suspect statements where a police officer deliberately withholds *Miranda* warnings during the first interrogation, in order to later obtain the same confession after issuing *Miranda* warnings.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Antoine Hill, respectfully petitions for a writ of certiorari in this case to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported. App.1a. The ruling of the United States District Court for the Eastern District of Virginia is unreported. App.8a.

JURISDICTION

The Fourth Circuit filed its opinion on August 13, 2009. The Court granted an extension of time to file the petition for writ of certiorari to December 21, 2009. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution guarantees that no person "shall be compelled in any criminal case to be a witness against himself."

STATEMENT

This case concerns a narrow exception that, over the last two decades, has been applied to a broad swath of circumstances never envisioned by this Court. In *New York v. Quarles*, 467 U.S. 649, 658 (1984), the Court established the "public safety" exception to the general rule that law enforcement must issue *Miranda* warnings prior to custodial

interrogation. Although the Court tethered the public safety exception to exigency, several courts of appeals have applied the exception to circumstances which present public or officer safety concerns, but no exigency. Other courts of appeals, however, have required it. And some courts of appeals, like the Fourth Circuit here, have required exigency in some cases, but not in others. The result is that defendants' Fifth Amendment rights against self-incrimination under *Miranda* are determined by where they reside and what panel they are fortunate to draw on appeal.

The Court's intervention is needed to reconcile the various approaches by the courts of appeals and to tie the public safety *exception* to exigency, lest it swallow the rule.

This case also concerns the fallout from the Court's fractured decision in *Missouri v. Seibert*, 542 U.S. 600 (2004). Since *Seibert*, the courts of appeals have divided on the standard to apply when judging whether pre-*Miranda* statements taint post-*Miranda* statements. The court below applied no standard, dismissing petitioner's argument in a footnote and holding that the post-*Miranda* statements were admissible under *Seibert* and *Oregon v. Elstad*, 470 U.S. 298 (1985).

The Court's guidance is needed to establish one standard for determining whether post-*Miranda* statements are admissible after law enforcement have deliberately withheld *Miranda* warnings during the first round of questioning. For these reasons, the Court should grant review.

1. On August 10, 2007, Detective Todd Bevington and several other members of the Richmond Police Department were conducting surveillance outside petitioner's home in hopes of arresting petitioner after he left his apartment. After the arrest, the officers planned to carry out a search of petitioner's apartment, seeking firearms and evidence relating to narcotics trafficking.

Petitioner left his apartment, entered his vehicle and drove away. Detective Bevington conducted a traffic stop and arrested petitioner. As Bevington transported petitioner to the police station, several other detectives began searching petitioner's apartment. [1]

On the way to the station, petitioner was asked a series of what Bevington labeled "officer safety questions." Although petitioner answered the first question of whether anyone else was inside the apartment, Bevington continued with two other "officer safety" questions. Those two questions were whether firearms or drugs were located in the apartment.

Petitioner was not advised of his *Miranda* rights prior to these questions.

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[1] It is unclear when exactly the officers began searching petitioner's apartment. Bevington testified at one point that his fellow officers began conducting the search while he transported petitioner to the station. Suppression Hearing, at 7. But later Bevington stated that the search was conducted an hour after the arrest. Supp. Hr., at 17. And the district court failed to make a factual finding on this discrepancy. For the purposes of this petition, when the officers conducted the search is not material to the questions presented.

In response to the series of "officer safety" questions, petitioner made several incriminating statements. Specifically, petitioner admitted that a firearm and narcotics were located in his apartment, and that he had been purchasing and dealing heroin.

Approximately two to three hours after the initial questioning, Detectives Bevington and Killingsworth advised petitioner of his *Miranda* rights. This occurred inside the stationhouse. The detectives proceeded to ask petitioner the same questions about the presence of the firearm and heroin found in his apartment. In response to the questioning, petitioner repeated his previous incriminating statements.

A search of petitioner's apartment revealed a firearm and a quantity of heroin.

2. Petitioner was indicted on one count of possession with intent to distribute heroin (21 U.S.C. § 841), one count of possessing a firearm in furtherance of a drug trafficking crime (18 U.S.C. § 924(c)), and one count of possessing a firearm after previously being convicted of a felony (18 U.S.C. § 922(g)).

Prior to trial, a hearing was held on petitioner's motion to suppress the statements made to law enforcement. At the hearing, Detective Bevington admitted that he never advised petitioner of his *Miranda* rights prior to questioning petitioner on the way to the police station.

Detective Bevington explained that the reason he asked petitioner questions, without first issuing *Miranda* warnings, was due to officer safety.

Bevington failed to offer, however, any explanation why questioning on whether another individual was present in the apartment was needed, given that officers were already conducting the search—or why further questioning was needed after petitioner answered that no one else remained in the apartment. And ultimately, Bevington admitted that the questions pertaining to drugs *were not* needed to protect officer safety.

The district court denied the motion to suppress based on the public safety exception to the *Miranda* rule. The court noted that officers "may question a person pre-*Miranda* at the scene of an arrest regarding weapons, drug use, or other matters relevant to the safety of the officers or members of the public." App.11a. Because officers "had reason to believe there were weapons at Hill's residence," the court held that the public safety exception applied. App.11a The court also held that the second statements were admissible since *Miranda* warnings had been issued. App.12a.

Petitioner was convicted of all three counts in large part due to the incriminating statements admitted during the trial.

3. On appeal petitioner argued that the district court improperly applied the *Quarles* public safety exception to his pre-*Miranda* statements. Petitioner further argued that since law enforcement piggybacked his post-*Miranda* statements to the illegally solicited pre-*Miranda* statements, both sets of statements should have been suppressed.

Despite the absence of factual findings from the district court, the court of appeals first concluded

that the officers conducted the search of petitioner's apartment after petitioner had been questioned. Since petitioner's apartment had yet to be secured, the court held that any questions related to firearms fell within the public safety exception to *Miranda*. App.3a.

Although petitioner lost on the firearm question, he succeeded on the drug question. The court of appeals held that Bevington's questions regarding the location of drugs in the apartment fell outside of the public safety exception, and thus, the district court erred in admitting petitioner's statements on that subject. The court nevertheless concluded that any error was harmless because the district court correctly admitted the post-*Miranda* statements, which were "essentially identical" to the pre-*Miranda* statements. App.4a.

In rejecting petitioner's argument that the post-*Miranda* statements should also have been suppressed, the court cited prior circuit precedent holding that few pre-warning questions will render post-warning responses inadmissible. App.4a (citing *United States v. Mashburn*, 406 F.3d 303 (4th Cir. 2005) (holding that post-*Miranda* statements admissible unless there is evidence that an officer's failure to issue *Miranda* warnings was deliberate or the post-*Miranda* statements were involuntarily made)).

REASONS FOR GRANTING THE PETITION

The Court should grant this petition to clarify lower court perplexity over two lines of cases dealing with *Miranda v. Arizona*, 384 U.S. 436 (1966). First, the lower courts are divided on the scope of the

public safety exception to the *Miranda* rule. The court below deepened an already large split on whether exigent circumstances are needed to apply the public safety exception to *Miranda*. Second, lower courts are confused over which *Missouri v. Seibert*, 542 U.S. 600 (2004), standard to apply when law enforcement intentionally withhold *Miranda* warnings, interrogate defendants, and then provide the warnings before eliciting a second confession. Because these two questions have divided lower courts and are essential to ensure that constitutionally-required *Miranda* warnings continue to be conveyed to criminal defendants, the Court should grant the writ.

I. This Court's intervention is needed to ensure that the public safety exception remains a "narrow" exception, based upon exigency, to the general rule requiring *Miranda* warnings.

A: The lower courts are divided on whether the *Quarles* public safety exception requires exigency.

In *New York v. Quarles*, 467 U.S. 649 (1984), the defendant accused of armed rape fled into a grocery store. Before he was arrested, Quarles stashed a firearm behind some empty cartons. The arresting officer subdued Quarles and noticed that he was wearing an empty holster. Prior to issuing *Miranda* warnings, the officer asked Quarles where the firearm was located, and he responded, directing the officer to the location of the firearm. 467 U.S. 652-53. This Court concluded that the evidence was

admissible and for the first time recognized a "public safety" exception to the *Miranda* rule.

The *Quarles* Court believed that the "public safety" exception would be easy for police officers to apply and lower courts to review, "because in each case it will be circumscribed by the exigency which justifies it." *Id.* But determining when exigency justifies the means has not proved so easy. [2]

The courts of appeals are divided on when the public safety exception applies. Some courts require actual exigent circumstances before police may question defendants without first reading the *Miranda* warnings. The courts on the other side of the divide use a different approach. Those courts apply the public safety exception anytime police encounter safety concerns, regardless of whether those concerns require urgent action.

1. Both the Fifth and Sixth Circuits require exigency before law enforcement may forego *Miranda* warnings and interrogate suspects. For example, in *United States v. Raborn*, 872 F.2d 589 (5th Cir. 1989), police officers had arrested the defendant during a traffic stop. The officers, believing the defendant had a firearm in his truck, questioned him about the location of a gun without first issuing *Miranda* warnings. The defendant admitted to possessing an illegal firearm in his truck and his statements were later used at trial to convict him.

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[2] *See e.g., United States* v. *Jefferson*, 2008 WL 1848798 at *7 (M.D. Ala. April 24, 2008) (applying the public safety exception where the defendant is already in handcuffs and is secure has "presented a greater problem than the Court predicted.").

On appeal, the government argued that the statements where admissible under *Quarles*. But the Fifth Circuit was unconvinced. The court noted that the public was in no immediate danger necessitating the public safety exception, because only the officers had access to the truck. The court therefore found the exception inapplicable.

The Fifth Circuit has continued to require the presence of exigent circumstances before law enforcement may employ the public safety exception. In facts strikingly similar to the case presented here, the court of appeals held in *United States v. Brathwaite*, 458 F.3d 376, 383 n.8 (5th Cir. 2006), that where agents had the arrestee confined and had established that no occupants remained in an apartment, the officers could not ask about the presence of weapons in the house without first issuing *Miranda* warnings.

The Sixth Circuit has established a standard that explicitly requires immediate danger before the public safety exception may be employed. In *United States v. Williams*, 483 F.3d 425 (6th Cir. 2007), police officers entered the suspect's apartment and placed him into custody. Similar to this case, the officers asked "if anybody else was in the room and if he had any weapon." *Id.* at 427. Holding that the suspect's response identifying the location of the firearm was inadmissible, the court concluded that "[t]he public safety exception applies if and only if" an officer has "a reasonable belief that he is in danger" because, "at minimum," (1) "the defendant might have (or recently have had) a weapon, and (2)... someone

other than police might gain access to that weapon and inflict harm with it." *Id.* at 428. [3]

Federal district courts and state courts have also required a need for immediate questioning to justify invoking the public safety exception. *See e.g.*, *United States v. Salahuddin*, 607 F.Supp.2d 930, 944 (E.D.Wis. 2009) ("The court disagrees that the possible presence of an unknown person, in an apartment that was under continuous surveillance for the last day, justifies use of the public safety exception. If the only requirements for the exception are the presence of officers and the mere potential that a second, unidentified person is present, the exception again applies in the majority of arrests and cannot be termed an *exception.*") (emphasis in original); *United States v. Rodriguez*, 931 F.Supp. 907, 911 (D.Mass. 1996) (concluding that there was no immediate danger present to justify an objectively reasonable need to protect the public or police); *State v. Strozier*, 876 N.E.2d 1304, 1308-09 (Ohio App. 2 Dist. 2007) ("In order to establish that the [public safety] exception is warranted in any given case, the State must show that: (1) there was an *objectively* reasonable need to protect the police or the public, (2) from an *immediate* danger, (3) associated with a weapon, and that (4) the questions asked were related to that danger and reasonably necessary to secure public safety.") (emphasis in original); *State v. Stephenson,* 796 A.2d 274, 280-81 (N.J. Super. A.D. 2002) (In order to invoke the exception "[t]here must be a compelling and exigent need, under the totality

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[3] The Sixth Circuit has continued to employ the exigency standard in subsequent cases. *See e.g., United States v. Kellogg,* 306 Fed.Appx. 916 (6th Cir. 2009).

of the circumstances, to protect the police or the public."); *In the Matter of John C.*, 519 N.Y.S.2d 223, 227 (1987) (holding that suppression of evidence was required because there was no volatile situation requiring immediate action which would fall under the narrow public safety exception); *State v. Hendrickson*, 584 N.W.2d 774 (Minn. Ct. App. 1998).

2. Three other courts of appeals, however, take a view of the public safety exception that directly conflicts with those above. In *United States v. Liddell*, 517 F.3d 1007, 1008-1009 (8th Cir. 2008), the defendant had been pulled over for a minor traffic infraction. But a license check revealed that he was not permitted to drive legally. Based on that information, Liddell was handcuffed, searched, and placed in the patrol car while the officers searched his vehicle. Although no other people were nearby, the officers asked him if there was anything else in the car that they needed to know about that could hurt them. Liddell, who had not yet received his *Miranda* warnings, responded in part by stating that a gun was in his car. The Eighth Circuit held that "the risk of police officers being injured by the mishandling of unknown firearms or drug paraphernalia provides a sufficient public safety basis to ask a suspect who has been arrested and secured whether there are weapons or contraband in a car or apartment that the police are about to search." *Liddell*, 517 F.3d at 1009-1010.

The Eighth Circuit's standard contains no temporal limitation. Under that standard, as long as officers possess suspicion that firearms or drug paraphernalia could be present in the area to be searched, it does not matter when the public safety

exception is invoked and questioning without *Miranda* warnings begin. In other words the Eighth Circuit's standard contains no exigency requirement. Such a standard in which exigency is irrelevant cannot be squared with those above.

In fact, in a concurring opinion Judge Gruender recognized that the Eighth Circuit's standard directly conflicts with those from the Fourth, Fifth and Sixth Circuits. *Id.* at 1012; *see also*, *United States v. Jones*, 154 F.Supp. 2d 617, 628 (S.D.N.Y. 2001) (courts have taken "divergent approaches to determining the breadth of the public safety exception"). Judge Gruender upheld the search based on previous circuit precedent, but wrote separately to address his concerns that Eighth Circuit's decisions had "strayed from the Supreme Court's tethering of the exception to the existence of exigent circumstances." *Id.*

The First and Tenth Circuits have taken approaches similar to that of the Eighth. In *United States v. Fox*, 393 F.3d 52 (1st Cir. 2004), *vacated on other grounds*, 545 U.S. 1125 (2005), the First Circuit allowed police officers to question suspects regarding weapons in a vehicle based on the public safety exception. *See also*, *Liddell*, 517 F.3d at 1012 (Gruender, J., concurring) ("[T]he First Circuit agrees with our precedents."). And the Tenth Circuit also allows police officers to question suspects about weapons without the necessity of immediate danger—concluding that the presence of firearms in an area about to be searched is inherently dangerous, thus triggering the public safety exception. *United States v. Phillips*, 94 Fed.Appx. 796 (10th Cir. 2004).

3. The Fourth Circuit has jumped from both sides of the divide. In *United States v. Mobley*, 40 F.3d 688 (4th Cir. 1994), the court was confronted with a situation where the arrestee's apartment had already been secured and there were no third parties in the vicinity. An officer asked the defendant whether "there was anything in the apartment that could be of danger to the agents who would be staying to conduct the search warrant, such as a weapon." *Id.* at 691. The arrestee responded that there was a weapon in the apartment. This statement was later used to convict the arrestee. Reversing the conviction, the Fourth Circuit refused to apply the public safety exception "[a]bsent an objectively reasonable concern for immediate danger to police or public." *Id.* at 693. In so holding, the court rejected the government's argument that the risk of encountering a firearm during the search constituted a threat to the public safety. The court noted that a threat to officer safety was present in the majority of searches, yet the public safety exception was not applicable to all threats, just exigent ones. *Id.*

The Fourth Circuit continued to apply the *Mobley* rule in *United States v. Melvin*, 2007 WL 2046735, at *11 (4th Cir. July 13, 2007), holding that the government must "demonstrate an immediate need that would validate protection under the *Quarles* exception." In *Melvin*, the police officers, like those in this case, faced the danger of coming across hidden weapons during a search. But the Fourth Circuit held the *Quarles* exception inapplicable, and suggested that the danger of coming upon a weapon during a search can never be sufficient on its own to trigger the public safety exception. *Id.* at *11.

In this case, the Fourth Circuit switched course. The court held that the public safety exception applied because police were "aware that [petitioner] did not reside in the apartment alone, and had reason to suspect that weapons were located in the residence." App.4a. But fear of another person could not have been a reason for the continued questioning of petitioner once he responded that no other persons where in the apartment. And the need to discover firearms surely did not constitute exigency. Given that no exigency was present, the Fourth Circuit's opinion directly contravenes its prior decisions and those from other circuits.

4. Twenty-five years have passed since the Court's decision in *Quarles*, and at least twelve federal and state courts of appeals have weighed in on the question of whether exigency is required before police may question suspects without issuing *Miranda* warnings; no consensus has emerged. Further percolation is not needed because the split has only hardened with time. Moreover, the scenario presented here—where police arrest a suspect and officer safety is implicated because of the possible presence of firearms or drug paraphernalia at the search site—occurs with regularity. Thus, the Court is presented not only with a question which has divided the lower courts, but also a question of significant daily impact on police interaction with citizens. The Court's guidance is therefore needed to ensure that the public safety exception is applied evenly to citizens residing in all parts of the country.

The Court's intervention is also needed because if the public safety exception is not tied to exigency, it threatens to swallow the general rule that police may

not interrogate criminal suspects without first reading them the *Miranda* warnings.

B: The court of appeals' decision conflicts with *Quarles* because the public safety exception does not apply to every threat of public or officer safety, only those situations requiring exigency.

1. In establishing the public safety exception, the Court was clear that it was not meant to be a broadly applied tool for law enforcement to conduct fishing expeditions anytime public or officer safety is implicated. *Quarles*, 467 U.S. at 658. Rather, it is needed only when exigency is present. In fact, throughout the opinion the Court focused on the urgency of the situation. *See e.g.*, 467 U.S. at 657-58 (public safety exception was needed because police officers are called upon to make decisions, "often in a matter of seconds," whether to forego *Miranda* warning in order to obtain evidence or statements required for public or officer safety); *id.* at 658 ("[W]e recognize here the importance of a workable rule to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.").

That exigency is required before the public safety exception may be applied was also clear from the Court distinguishing *Quarles* from *Orozco v. Texas*, 394 U.S. 324 (1969). In *Orozco*, four officers entered Orozco's house, arrested him, and interrogated him without *Miranda* warnings, regarding a murder committed hours earlier. The police asked if he had been present at the scene of the shooting, whether he

owned a gun and where the gun was located. The defendant admitted that he was present at the scene, that he owned a pistol and that the pistol was located in the washing machine in a backroom of the house.

Comparing the cases, the *Quarles* Court stated:

> In *Orozco* however, the questions about the gun were clearly investigatory; they did not in any way relate to an objectively reasonable need to protect the police or the public from any *immediate danger* associated with the weapon. In short there was no *exigency requiring immediate action* by the officers beyond the normal need expeditiously to solve a serious crime.

Quarles, 467 U.S. at 659 n.8.

The Court thus distinguished situations where public or officer safety required exigency and situations where it did not. In doing so, the Court undoubtedly recognized that if the public safety exception was truly to apply as an *exception*, it must necessarily be tied to exigency.

During the questioning of petitioner, no exigent circumstances were present. Police had arrested petitioner and were transporting him to the police station when officer Bevington began his interrogation. Although police had been conducting surveillance on petitioner's apartment for hours and had not observed any other individuals arriving or leaving petitioner's apartment, officer Bevington immediately asked if anyone was present in petitioner's apartment. Once petitioner responded

"no," there was no need to continue questioning petitioner about the location of firearms and drugs without *Miranda* warnings The only other danger to police officers was the possible presence of firearms or drug paraphernalia at the apartment—a threat which exists in a large majority of searches.

2. The court of appeals' ruling below, if carried to its logical conclusion, would apply the public safety exception to every situation where officer safety may be implicated. Indeed, the same concern for officer safety in this case would have existed endlessly, if the officers had not promptly searched petitioner's apartment. But under the narrow exception established by *Quarles*, officers may only forego the constitutionally-required *Miranda* warnings if exigency is present. Where it is not, officers must perform the "[simple] expedient of giving an adequate warning" that suspects may invoke silence and counsel. *Miranda*, 384 U.S. at 468. To sanction unwarned questioning regarding the whereabouts of a gun in every case where one is suspected would result in the exception swallowing the rule.

3. The courts of appeals' ruling conflicts with *Quarles* in one other respect: the court countenanced what were clearly "questions designed solely to elicit testimonial evidence from a suspect." *Quarles*, 467, U.S. 658-59. As noted, officer Bevington continued to question petitioner after he indicated that no other persons were present in his apartment. The following questions regarding the location of firearms and drugs were nothing more than a deliberate end-run around *Miranda*. In fact, the officer admitted as much during the suppression hearing when asked why such questions were needed based on officer safety. Because the court of appeals' decision

conflicts with *Quarles* in several respects, review is warranted.

II. This Court's guidance is needed to determine one standard for situations where police officers deliberately interrogate a suspect without *Miranda* warnings and subsequently interrogate with *Miranda* warnings, in order to obtain an admissible confession.

The Court has twice had the opportunity to address situations where police interrogate a suspect without issuing *Miranda* warnings and then conduct a second interrogation after giving the warnings. In both *Oregon v. Elstad*, 470 U.S. 298 (1985), and *Missouri v. Seibert*, 542 U.S. 600 (2004), the admissibility of the second warned confession was at issue.

1. In *Elstad*, police arrested a young suspect at his home for burglary. Prior to arrest, one officer explained to the suspect's mother that the young man was involved in a burglary, while the other questioned the young man. The suspect responded, stating that he had been at the scene of the burglary. *Id.* at 315. After transporting the suspect to the police station, the officers read him the *Miranda* warnings and elicited a confession.

This Court noted that the incident had "none of the earmarks of coercion," and ruled that the second post-warning statements were admissible. *Id.* at 313. In so doing, the Court rejected the argument that the statements derived from the second round of questioning should have been suppressed as the fruits of the first illegal questioning, and noted that the causal connection between the first and second

responses was "speculative and attenuated." *Id.* The Court also characterized the officers' omission to issue *Miranda* warnings as "a simple failure," rather than a deliberate ploy. *Id.* at 309.

2. In contrast, the questioning in *Siebert* was "systematic, exhaustive, and managed with psychological skill." *Seibert*, 542 U.S. at 616. There, the police had taken the defendant to the police station and deliberately questioned her without *Miranda* warnings for 30 to 40 minutes. The police then started a tape recorder, issued *Miranda* warnings and obtained a signed waiver of rights. Questioning was resumed and the officer conducting the interrogation specifically mentioned Siebert's previous unwarned confession. As this Court noted, "[w]hen the police were finished there was little, if anything, of incriminating potential left unsaid." *Id.* at 616. During the suppression hearing, the officer testified that, in compliance with officer training manuals, a deliberate decision was made to question first, warn later.

A plurality of this Court held that this deliberate end-run around *Miranda* required suppression of the second statements because the warnings mid-interrogation challenged the very "comprehensibility and efficacy" of *Miranda* warnings "to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk." *Id.* at 617. The plurality employed a multi-factor objective test for determining when *Miranda* warnings delivered midstream could be effective enough to accomplish their objective. *Id.* at 615.

Justice Kennedy concurred in the judgment but rejected the objective test championed by the plurality. *Id.* at 619-622. Justice Kennedy applied a different test that looks to the officer's subjective intent. Under that test, if an officer conducts the deliberate two-step strategy, the post-*Miranda* evidence must be excluded unless curative measures are taken. *Id.* at 622. Curative measures included "a substantial break in time and circumstances" between the two statements to allow the "accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn." *Id.* Although Justice Kennedy ultimately agreed that the post-warning statements were inadmissible, his rationale differed markedly from that of the plurality.

A: Since *Seibert*, the lower courts have not settled on one standard for determining when question-first-warn-later statements are admissible.

The Court's fractured *Seibert* decision has produced a multitude of confusion in the lower courts on the appropriate standard for determining when question first, warn later statements are admissible.

1. Some appellate courts have used Justice Kennedy's opinion as the standard, reasoning that *Marks v. United States*, 430 U.S. 188, 193 (1977), requires that the *Seibert* holding must be based on the "narrowest grounds." Those courts have concluded that that only subjective, deliberate use of the two-step interrogations must be suppressed. *See e.g., United States v. Williams*, 435 F.3d 1148, 1157-59 (9th Cir. 2006) ("Although the plurality would consider all two-stage interrogations eligible for a *Seibert* inquiry, Justice Kennedy's opinion narrowed

the *Seibert* exception to those cases involving deliberate use of the two-step procedure to weaken *Miranda's* protection."); *United States v. Kiam*, 432 F.3d 524, 532-33 (3rd Cir. 2006) (applying Justice Kennedy's test in finding that law enforcement officials had not performed a deliberate two-step interrogation); *United States v. Mashburn*, 406 F.3d 303, 308-09 (4th Cir. 2005) ("In *Seibert*, Justice Kennedy concurred in the judgment of the Court on the narrowest grounds."); *United States v. Briones*, 390 F.3d 610, 613 (8th Cir. 2004) ("Because Justice Kennedy relied on grounds narrower than those of the plurality, his opinion is of special significance."); *Martinez v. Texas*, 272 S.W.3d 615, 620 (Tex. Crim. App. 2008) (applying Justice Kennedy's opinion as if it were the holding of the Court).

2. Other courts have recognized that the *Seibert* opinions are more complex and Justice Kennedy's opinion may not comprise the "narrowest holding." *See e.g., United States v. Stewart*, 388 F.3d 1079, 1090 (7th Cir. 2004) (reading the plurality's balancing test into Justice Kennedy's allowance for "curative steps"); *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006) (describing the problem with adopting Justice Kennedy's approach); *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1139-42 (9th Cir. 2005) (Berzon, J., dissenting) (explaining why courts should not adopt Justice Kennedy's opinion and should apply the plurality's test). And one court has abandoned reconciling the fractured *Seibert* opinions, instead analyzing the admission of post-*Miranda* statements under both Justice Kennedy's and the plurality's test. *See e.g.*, *Tennessee v. Dailey*, 273 S.W.3d 94, 107 (Tenn. 2009). Finally, the Georgia Supreme Court recently held

that only the *Seibert* plurality opinion could control, because Justice Kennedy's opinion was explicitly rejected by both the *Seibert* plurality and the dissent. *Georgia v. Pye*, 653 S.E.2d 450, 453 n.6 (Ga. 2007).

The confusion surrounding the application of *Seibert* is unlikely to dissipate on its own without further guidance from the Court. Only this Court alone can discern the appropriate standard for the admissibility of question first, warn later statements. Moreover, the lower courts have grappled with the fractured *Seibert* opinions for five years, which has itself produced more fractured standards from the lower courts. Judicial economy would be well-served by ending the lower court confusion now, rather than later. For these reasons, the Court's guidance is needed to resolve the confusion surrounding *Seibert*.

B: The court of appeals' decision, holding petitioner's post-warning statements admissible, was erroneous.

The court of appeals rejected, without analysis, petitioner's argument that his post-warning statements were inadmissible. Had the court properly analyzed the statements under the *Seibert* plurality standard, it is clear that the statements were inadmissible.

1. The objective test employed by the *Seibert* plurality should govern this case. First, Justice Kennedy's subjective test admittedly governs only when police deliberately employ the question-first-warn-later technique and later admit to it. *Seibert*, 542 U.S. at 619-622. Only after officer admission, may the subjective intent be found. Secondly, Justice Kennedy's subjective test was not adopted by any other member of the Court. Indeed, seven other

Justices flatly rejected such a subjective element; only Justice Breyer would have partially joined such a holding. Thus, it cannot be said that Justice Kennedy's test constitutes the holding of the Court even under a *Marks v. United States*, 430 U.S. 188, 193 (1977), analysis.

Applying Justice Kennedy's subjective test is simply not feasible given the realities of police testimony. As the *Seibert* plurality acknowledged, rarely will the intent of the officer "be as candidly admitted" as it was in *Seibert*, thus the "focus is on facts apart from intent that show the question-first tactic at work." *Seibert*, 542 U.S. 617 n.6.

Petitioner's case highlights that reality. This was not a case where the officers admitted to conducting a deliberate end-run around *Miranda*. But nor was this a case where the police accidently forgot to issue *Miranda* warnings before conducting interrogation. While officer concern was the alleged motivation behind the unwarned questioning, Bevington could not, however, explain what officer safety concerns demanded a hastily executed interrogation without *Miranda* warnings. In fact, when asked why questioning was needed on the location of narcotics, detective Bevington admitted that the warnings were not given due to officer safety concerns. Based upon these admissions and omissions, it can be inferred that the question first, warn later tactic was employed. And in such a case, only the *Seibert* plurality test can be employed to determine the admissibility of the second warned statements.

2. All of the factors employed by the *Seibert* plurality test cut towards inadmissibility of the post-warning statements. First, the questions and

responses of both the pre and post-warning statements were, as the Fourth Circuit acknowledged, "essentially identical." App.4a. Second, while an officer other than Bevington issued petitioner *Miranda* warnings, Bevington conducted both the first and second interrogations—a factor the *Seibert* plurality found applicable in determining admissibility. *Seibert*, 542 U.S. at 615. Third, petitioner was interrogated in virtually the same setting. The first interrogation took place in police custody on the way to the stationhouse and the second occurred inside the stationhouse. And lastly, no curative steps were taken to dissipate the taint from the first unwarned confession, so that petitioner would understand his rights during the second interrogation. In such circumstances, the *Miranda* warnings could not have served their purpose and the post-warning statements must be suppressed.

Because the court of appeals' decision conflicts with a relevant decision from this Court, review is warranted.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-5023

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTOINE HILL,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Richard L. Williams, Senior District Judge. (3:07-cr-00407-RLW-1)

Submitted: July 6, 2009 Decided: August 13, 2009

Before MICHAEL and MOTZ, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Timothy V. Anderson, ANDERSON & ASSOCIATES, Virginia Beach, Virginia, for Appellant. Dana J. Boente, Acting United States Attorney, Michael A. Jagels, Special Assistant United States Attorney, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Antoine Hill appeals his jury conviction and 300-month variant sentence for possession with intent to distribute heroin, in violation of 21 U.S.C. § 841 (2006), possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c) (2006), and possession of ammunition by a felon, in violation of 18 U.S.C. § 922(g)(1) (2006). Hill asserts that: (i) the district court erred when it denied his suppression motion by allegedly misapplying the public safety exception to pre-*Miranda*[1] custodial statements and then incorrectly admitted his post-*Miranda* statements; (ii) the district court erred when it refused to instruct the jury that it could not conclude that Hill had "knowledge" of his drug possession from negligence, carelessness, or his belief in an inaccurate proposition; and (iii) ineffective assistance of counsel conclusively appears on the record because trial counsel failed to argue for an appropriate sentence and instead moved to withdraw

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

just prior to sentencing.[2] Finding no reversible error, we affirm.

We find that Hill's pre-*Miranda* statement pertaining to a weapon located in his residence implicates the public safety exception to *Miranda* under *New York v. Quarles*, 467 U.S. 649 (1984). Police were aware that Hill did not reside in the apartment alone, and had reason to suspect that weapons were located in the residence. Moreover, at the time Hill was questioned, the residence had not yet been secured.

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[2] Hill has also moved to file a pro se supplemental brief and to relieve his counsel and proceed pro se on appeal. Because there is no constitutional right to self-representation on appeal, *see Martinez v. Court of Appeal*, 528 U.S. 152, 161 (2000), and because we find that Hill did not move to proceed pro se at the earliest possible time, 4th Cir. R. 46(f), we deny Hill's motion to relieve counsel and to proceed pro se. Moreover, although Hill explains that he wishes to proceed pro se so he may move this Court for release pending appeal, because we affirm Hill's conviction and sentence, Hill's motion for release would be denied. *See* 18 U.S.C. § 3143(b) (2006) (providing that a criminal defendant should be detained pending appeal unless it appears, by clear and convincing evidence, that the appeal raises a substantial question of law or fact that requires reversal, an order for a new trial, a non-prison sentence, or "a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process"). We grant Hill's motion to file a pro se supplemental brief, but after considering the arguments raised therein, conclude that Hill's ineffective assistance of counsel claim is not cognizable on direct appeal. *See United States v. Baldovinos*, 434 F.3d 233, 239 (4th Cir. 2006) (ineffective assistance of counsel claims are generally not cognizable on direct appeal unless the ineffectiveness "conclusively appears" on the record).

Based on these circumstances, we find that Hill's pre-*Miranda* statement regarding the existence of a weapon in his apartment falls within the *Quarles* exception to *Miranda* and was properly admitted by the district court.

We nonetheless find that the transporting officer's pre-*Miranda* inquiry into whether drugs were located in Hill's residence does not implicate the *Quarles* exception. In fact, one of the officers admitted at the suppression hearing that there "is no officer safety purpose in knowing whether or not there [we]re drugs in the apartment." This finding, however, affords Hill no relief. Because the district court correctly admitted Hill's post-*Miranda* statements[3] – which were essentially identical to his pre-*Miranda* statements – we conclude that the jury

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[3] Hill's assertions to the contrary, the mere fact that Hill's post-*Miranda* statements confirmed his pre-*Miranda* admissions does not, in and of itself, render the post-*Miranda* statements involuntary and inadmissible. *See Oregon v. Elstad*, 470 U.S. 298, 314 (1985) (holding that "absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion" as to any subsequent, post-warning statement); *United States v. Mashburn*, 406 F.3d 303, 307-10 (4th Cir. 2005) (holding that a few pre-warning questions will not render post-warning responses involuntary and inadmissible if: (i) there was no evidence that an officer's failure to convey Miranda warnings was deliberate or intentional; and (ii) there was no evidence that the post-warning statement was involuntarily made). Accordingly, we conclude that the district court did not err in allowing Hill's post-*Miranda* statements to be presented to the jury.

"would not have found the [Government's] case significantly less persuasive" if the pre-*Miranda* statements had been excluded. *See Schneble v. Florida*, 405 U.S. 427, 432 (1972); *see also United States v. Abu Ali*, 528 F.3d 210, 231 (4th Cir. 2008) (recognizing that an error "will be deemed harmless if a reviewing court is able to say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error") (internal citations and quotation marks omitted), *cert. denied*, 129 S. Ct. 1312 (2009). Thus, because the jury would have received the same evidence even if Hill's pre-*Miranda* statements were suppressed by the district court, any error by the district court to admit Hill's pre-*Miranda* statement was harmless beyond a reasonable doubt.

We also conclude that the district court did not abuse its discretion when it denied Hill's proposed jury instruction.

> A district court's refusal to provide an instruction requested by a defendant constitutes reversible error only if the instruction: (1) was correct; (2) was not substantially covered by the court's charge to the jury; and (3) dealt with some point in the trial so important [] that failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense.

United States v. Lewis, 53 F.3d 29, 32 (4th Cir. 1995) (internal quotation marks and citation omitted).

Although the Government does not dispute that Hill's proposed jury instruction was a correct statement of the law, we find that Hill's requested instruction was substantially covered by the district court's remaining jury instructions.

Hill last asserts that his counsel was ineffective because he failed to file a sentencing memorandum with the district court, failed to argue for a variant sentence at his sentencing hearing, and instead moved to withdraw as counsel a day prior to Hill's sentencing hearing. Although Hill recognizes that this issue may be better left for review on a habeas corpus motion, Hill suggests that if the Court finds merit to his other arguments, "a remand for sentencing with prepared counsel" would be appropriate.

Even assuming, without deciding, that it was error for Hill's trial counsel to move to withdraw from representation just prior to his sentencing and to fail to argue for an appropriate sentence on his behalf, it does not conclusively appear on the record that but for counsel's purported errors, Hill's sentence would have been different. In fact, Hill's counsel concedes that "[i]t is impossible to know what factors could have or should have been presented to the Court at sentencing that may have persuaded the Court to depart by variance from the recommend[ed] sentencing guidelines."

Moreover, although the Government asked the district court to sentence Hill within his 360-month to life Guidelines range, the district court varied from

the Guidelines range and imposed a 300-month sentence. Because it is not apparent that the district court would have varied further based on any argument counsel may have made, we find that Hill's ineffective assistance claim based on counsel's failure does not conclusively appear on the record and, thus, is not cognizable on direct appeal. *See Strickland v. Washington,* 466 U.S. 668, 694 (1984); *United States v. Baldovinos,* 434 F.3d 233, 239 (4th Cir. 2006).

Based on the foregoing, we deny Hill's motion to relieve his counsel and to proceed pro se on appeal, grant Hill's motion to file a pro se supplemental brief, deny Hill's motions for bail or release pending appeal as moot, and affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

UNITED STATES OF AMERICA v. ANTOINE HILL, Defendant.	Criminal Action Number 3:07CR407

ORDER

This matter is before the Court on the defendant's motion to suppress and the addendum to the defendant's motion to suppress. For the reasons stated from the bench on June 24, 2008, the defendant's motion and the addendum to defendant's motion are DENIED.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

June 24, 2008
DATE

/s/
RICHARD L. WILLIAMS
SENIOR UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

The United States of America,

plaintiff,

versus 07 CR 407

Antoine Hill,

defendant

before: HONORABLE RICHARD L. WLLIAMS [sic]
Senior United States District Judge
June 24, 2008
Richmond, Virginia

[40] MR. JAGELS: Sorry. Those are all the questions I have.

THE COURT: All right. Fine. Thank you. I will take a brief recess.

(Witness stood aside)

(A recess was taken)

THE COURT: This matter is before The Court on the defendant's motion to suppress. Having heard the testimony today, I find as follows.

On August 10, 2007 Richmond City Police Department officers obtained a search warrant for a residence belonging to the defendant, Antoine Hill.

Detective James Killingsworth prepared the search warrant and affidavit. In his affidavit he stated that two confidential sources, henceforth CS's, had given information that provided probable cause for the search warrant to issue. The first CS gave Killingsworth information that the CS had been in Hill's apartment within the past 72 hours and had seen heroin inside the apartment for distribution.

Killingsworth noted that the first CS made controlled buys for Killingsworth in the past and that the CS had demonstrated an extensive knowledge of heroin. Killingsworth stated that the second CS had provided true, accurate, and reliable information [41] to officer Mark Dunn in the past, and that information provided by this CS was verified as true and accurate through independent police investigations, police surveillance, controlled purchases, recorded telephone conversation, and DMV and police records.

Before the officers executed the search warrant they observed Hill leaving the residence in a vehicle and initiated a traffic stop. The officers arrested Hill and transported him to the Special Investigation Division, hereafter known as SID, office. During the drive to SID the officers informed Hill of the search warrant for his residence and then asked Hill if he had any firearms in his residence. Hill said that he had a firearm in his bedroom. The officers next asked Hill if he had any drugs in the residence, and he told them there was heroin on the floor next to the sofa. Detectives searching Hill's residence found a semiautomatic pistol, ammunition, 56 grams of

heroin, a scale, packaging material, and $6,900 in U.S. currency.

After Hill arrived at SID Detective Killingsworth read him his Miranda warnings. Hill acknowledged his rights and agreed to speak with police. He stated that he owned the firearm. And [42] when asked about the narcotics in his residence he said he he [sic] had about two ounces of heroin, and identified his source. Hill also provided police with information about his past drug dealing activities.

The defendant first argues that the officers violated his fifth amendment right against self incrimination by questioning him while he was in their custody during the ride to SID headquarters, and at the headquarters itself without first advising him of his Miranda rights and obtaining from him a knowing and intelligent waiver of those rights. Miranda warnings are required whenever a suspect is in custody and subject to interrogation by law enforcement officials. And the Miranda case taught us that. However, there exists a limited public safety exception to the warning requirement. Officers may question a person pre-Miranda at the scene of an arrest regarding weapons, drug use, or other matters relevant to the safety of the officers or members of the public. And the New York versus Quarles case teaches us that. The Court finds that the public safety exception applies in this case since the officers had reason to believe there were weapons at Hill's residence. Accordingly, the Court [43] denies the defendant's motion to suppress the statements he

made before he was provided with his Miranda warnings. As to the admissibility of the statements Hill made later at STD headquarters, The Court finds that Hill was read his Miranda warnings and that he voluntarily waived his rights and subsequently made numerous incriminating statements about his involvement in the drug trade. The Court denies the defendant's motion to suppress any statements he made after he arrived at SID headquarters and. officers provided him with his Miranda warnings.

The defendant argues in his addendum to his motion to suppress that the search warrant was not valid. Hill contends that there was no probable cause since the source was allegedly not reliable. Evidence seized under a warrant may be suppressed if a defendant first makes a substantial preliminary showing that a false statement knowingly or intentionally, or with reckless disregard to the truth, was included by the affiant in the warrant affidavit. And the Franks versus Delaware case teaches us that. Second, the offending information must be essential to the probable cause determination. Once a search warrant has been [44] issued, review of the probable cause determination by the judicial officer is to be shown great deference. And United States versus Blackwood teaches us that. The Court finds that the defendant has not made a preliminary showing that Killingsworth included a false statement in the affidavit, The Court also finds that the information presented to the magistrate in the affidavit regarding two confidential sources provided ample probable cause for the search

warrant to issue. Therefore, The Court denies the addendum to the defendant's motion to suppress.

An order memorializing The Court's ruling will be entered, and counsel will receive a copy of it. We will go to trial as scheduled in the case.

Adjourn court until 2:00 o'clock, or recess court until 2:00 o'clock.

HEARING ADJOURNED.

No. 09-740

In the Supreme Court of the United States

ANTOINE HILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's statement that he kept a gun in his apartment, given in response to police questioning before he received *Miranda* warnings, was admissible under the public-safety exception to the *Miranda* rule.

2. Whether petitioner's statements about his drug-trafficking and gun possession, given after receiving *Miranda* warnings, were admissible notwithstanding that the police had earlier obtained from him unwarned statements that a gun and drugs could be found in his apartment.

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In the Supreme Court of the United States

No. 09-740

ANTOINE HILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is not published in the Federal Reporter but is available at 340 Fed. Appx. 950.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 2009. On November 4, 2009, the Chief Justice extended the time within which to file a petition for a writ of certiorari to December 21, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of possessing heroin with intent to distrib-

ute, in violation of 21 U.S.C. 841; possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c); and being a felon in possession of ammunition, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 300 months of imprisonment, to be followed by five years of supervised release. C.A. App. 286-287. The court of appeals affirmed. Pet. App. 1a-7a.

1. On August 10, 2007, police officers in Richmond, Virginia, received information from confidential sources that petitioner was a drug dealer and that he kept drugs and a gun at his apartment. Gov't C.A. Br. 4-5; Pet. App. 10a. The ensuing police investigation indicated that petitioner leased the apartment with another individual. C.A. App. 152-153. After receiving the information about petitioner, the officers obtained a search warrant for the apartment. Gov't C.A. Br. 5.

Before executing the search warrant, the officers conducted surveillance of the apartment building. Gov't C.A. Br. 5. During the surveillance, they observed petitioner leave the building and drive away. Pet. App. 10a. They stopped his vehicle, informed him of the search warrant, and transported him to the Special Investigation Division office. *Ibid.* During the trip to the office, without reading petitioner the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), Detective Todd Bevington asked petitioner three questions about his apartment—whether anyone was inside the apartment, whether there were any guns in the apartment, and whether there were any drugs in the apartment. Gov't C.A. Br. 5. Petitioner responded that nobody was in the apartment; that there was a gun in the bedroom; and that there was heroin in the living room. *Ibid.* Detective Bevington did not ask any follow-up questions. *Ibid.* After delivering petitioner to the office, Detective

Bevington returned to the apartment to assist in the execution of the search warrant. The search uncovered 56 grams of heroin, a semiautomatic pistol, drug paraphernalia, $6900 in United States currency, and other evidence. Pet. App. 10a-11a.

Following the execution of the search warrant, Detective James Killingsworth approached petitioner about speaking to him. Pet. App. 11a. Detective Killingsworth first read petitioner his *Miranda* rights, and then asked him if he understood them. Gov't C.A. Br. 6. Petitioner did. *Ibid.* Petitioner then told Detective Killingsworth, among other things, that he had possessed the firearm for two years and kept it for protection; that he had purchased the heroin found in his apartment for $5000; that he had purchased two ounces of heroin from the same source on one other occasion; that he dealt heroin to pay his bills; and that he had engaged in numerous purchases of drugs for further sale. *Id.* at 7-8.

2. Petitioner was indicted for possessing heroin with the intent to distribute it, in violation of 21 U.S.C. 841; possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c); and being a felon in possession of ammunition, in violation of 21 U.S.C. 922(g)(1). C.A. App. 8-10.

Before trial, petitioner moved to suppress the statements he made to law enforcement officers both before and after he received his *Miranda* warnings. The district court denied the motion. Pet. App. 9a-13a. It held that petitioner's initial statements to Detective Bevington were admissible, notwithstanding Bevington's failure to read petitioner his *Miranda* warnings, under the public-safety exception to *Miranda*. See *New York* v. *Quarles*, 467 U.S. 649 (1984). The officers had reason to believe, the court held, that weapons and other individu-

als at petitioner's apartment could pose a danger to officers in executing the warrant. Pet. App. 11a. The court admitted petitioner's post-warning statements because they were preceded by *Miranda* warnings. *Id.* at 12a.

Petitioner was subsequently tried and convicted on all counts of the indictment. C.A. App. 259. He was sentenced to 300 months of imprisonment, to be followed by five years of supervised release. *Id.* at 286-287.

3. The court of appeals affirmed in an unpublished per curiam opinion. The court first rejected petitioner's contention that the district court erred in admitting petitioner's unwarned statement that there was a gun in his apartment. Pet. App. 3a-4a. Citing *Quarles*, *supra*, the court explained that Detective Bevington's inquiry fell within the public-safety exception to *Miranda*, because the "[p]olice were aware that [petitioner] did not reside in the apartment alone, and had reason to suspect that weapons were located in the residence." Pet. App. 3a. The court added that "at the time [petitioner] was questioned, the residence had not yet been secured." *Ibid.*

The court next held that petitioner's unwarned statement that there were drugs in the apartment was obtained in violation of *Miranda*, because the possibility that the residence contained drugs did not implicate the public-safety exception. Pet. App. 4a. Nevertheless, the court concluded that the error in admitting the statement was harmless beyond a reasonable doubt. *Id.* at 4a-5a. The court explained that "[b]ecause the district court correctly admitted [petitioner's] post-*Miranda* statements—which were essentially identical to his pre-*Miranda* statements— * * * the jury 'would not have found the [government's] case significantly less persuasive' if the pre-*Miranda* statements had been exclud-

ed."[1] *Id.* at 4a-5a (footnote omitted; brackets in original) (quoting *Schneble* v. *Florida*, 405 U.S. 427, 432 (1972)).

Finally, the court of appeals rejected petitioner's argument that his pre-warning statements tainted his post-warning admissions and rendered them inadmissible. Pet. App. 4a n.3. The court concluded that there was no evidence that the police had deliberately failed to give the *Miranda* warnings until after petitioner's initial statements, that the police had employed "deliberately coercive or improper tactics in obtaining the initial statement," or that the post-warning statements were involuntarily made. *Ibid.* (quoting *Oregon* v. *Elstad*, 470 U.S. 298, 314 (1985), and *United States* v. *Mashburn*, 406 F.3d 303, 309 (4th Cir. 2005)).

ARGUMENT

1. Petitioner first contends (Pet. 7-18) that the court of appeals erred in holding that petitioner's pre-warning statement that there was a gun in his apartment was admissible pursuant to the public-safety exception to *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The presence of a gun in the apartment, petitioner argues, posed no immediate danger to the police officers or the public and, therefore, petitioner's statement should have been suppressed. The court's decision was correct, and it does not conflict with the decision of any other court of appeals. Further review is therefore unwarranted.

a. In *New York* v. *Quarles*, 467 U.S. 649 (1984), this Court recognized a public-safety exception to the requirement that police provide a suspect with *Miranda* warnings before statements taken in custodial interrogation may be admitted into evidence. In *Quarles*, officers chased a rape suspect through a supermarket and

[1] Petitioner does not challenge this holding here. Pet. i.

arrested him there. *Id.* at 651-652. The officers had learned that the suspect was armed, and, upon frisking him, discovered an empty shoulder holster. After handcuffing the suspect, one of the officers asked him where the gun was, to which the suspect responded, "the gun is over there." *Id.* at 652. The Court held that, although the suspect had not received *Miranda* warnings, his statement was nevertheless admissible because it was elicited by questioning that was "reasonably prompted by a concern for the public safety" or the safety of the police. *Id.* at 656, 658-659; *id.* at 659 n.8 (distinguishing between questions that are "clearly investigatory" and those that "relate to an objectively reasonable need to protect the police or the public from any immediate danger associated with the weapon").

Petitioner argues (Pet. 15-18) that *Quarles* requires a showing of exigent circumstances creating an emergent threat to the public or police and that the court of appeals erred in applying the public-safety exception because the police had no immediate need to ascertain whether petitioner's apartment contained a firearm. Petitioner's contention (Pet. 15-16) that *Quarles* requires an immediate safety emergency is refuted by the facts of *Quarles* itself. There, the defendant was handcuffed and in the custody of armed officers when police queried him about a weapon. See 467 U.S. at 655. As the dissent noted, the police had no evidence that the defendant had an accomplice, the supermarket was "apparently deserted" during the late-night arrest, and the "police could easily have cordoned off the store and searched for the missing gun." *Id.* at 674-676 (Marshall, J., dissenting); see *United States* v. *Carrillo*, 16 F.3d 1046, 1049 (9th Cir. 1994) (a "pressing need for haste is not essential"). Thus, the public-safety exception ap-

plies even in the absence of an exigent safety threat, so long as the police "ask questions reasonably prompted by a concern for the public safety."[2] *Quarles*, 467 U.S. at 656.

In holding that the questioning about the gun was permissible under the circumstances, the court of appeals correctly relied on the existence of reasonable safety concerns confronting the officers who were about to search petitioner's residence. Pet. App. 3a-4a. As the court observed, at the time that Detective Bevington asked petitioner about a gun, the police had not yet secured the apartment. *Id.* at 3a. In addition, the court noted, the police were aware that two people lived in petitioner's apartment and, therefore, it was possible that another person inside the apartment could gain access to any gun present inside and threaten the safety of the police. *Id.* at 3a-4a; C.A. App. 40 (officer testimony that he was concerned about "potential threat[s]" from unaccounted-for weapons and people in the apartment).

Petitioner's primary argument to the contrary (Pet. 16-17) is that petitioner told Detective Bevington, in answer to Detective Bevington's first question, that no

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[2] Petitioner contends (Pet. 16) that *Orozco* v. *Texas*, 394 U.S. 324 (1969), indicates that an immediate safety threat is required. That argument is misplaced. In *Orozco*, police officers arrested and then interrogated a suspect at length about his involvement in a murder, in the process asking him whether he owned a gun, and if so, where it was located. *Id.* at 325. This Court suppressed the defendant's statements because the defendant had not been given *Miranda* warnings before the interrogation. *Id.* at 326-327. As the Court noted in *Quarles*, the line of questions in *Orozco* was "clearly investigatory" and indistinguishable from the questions police would ask "to solve a serious crime." *Quarles*, 467 U.S. at 659 n.8. In *Quarles* itself, in contrast, the questioning was directed at neutralizing a potential danger to the public or the police.

other person was present in the apartment. But Detective Bevington was not required, at the risk of jeopardizing the safety of the officers who were going to secure the premises, to accept petitioner's assertion as true. The court of appeals therefore correctly held that *Quarles* permitted the police officer's question about the presence of a gun in the apartment. Petitioner's argument to the contrary is, at bottom, a challenge to the court's application of the legal standard to the facts of the case, and such a fact-bound claim does not merit this Court's review.

b. Petitioner contends (Pet. 8-15) that the court of appeals' decision conflicts with the decisions of other courts of appeals, district courts, and state courts, which, he asserts, have required a showing of exigent danger to the police or the public in applying the public-safety exception. Petitioner is incorrect. The decisions on which petitioner relies simply applied the inherently fact-specific *Quarles* standard by asking whether there was a reasonable need to protect the police or the public from an undiscovered weapon in light of the facts presented in each case.

In the federal appellate cases that petitioner cites (Pet. 8-14), the courts declined to apply the public-safety exception when the police had already eliminated any reasonable possibility that someone other than themselves could gain access to an unrecovered weapon by the time they questioned the defendant. See *United States* v. *Brathwaite*, 458 F.3d 376, 383 n.8 (5th Cir. 2006) (holding that public-safety exception did not apply because the police had already performed two sweeps of the defendant's house, knew that no one else was present, and had handcuffed its two occupants when they asked the defendant if there were any guns in the

house); *United States* v. *Raborn*, 872 F.2d 589, 595 (5th Cir. 1989) (stating in dicta that exception might not apply because the police had already arrested the defendant and secured and searched his truck when they asked him if there was a gun in the truck); *United States* v. *Williams*, 483 F.3d 425, 429-430 (6th Cir. 2007) (remanding to determine whether police could reasonably have believed "that someone other than police could access the weapon and inflict harm with it"); *United States* v. *Melvin*, No. 05-4997, 2007 WL 2046735, at *8, *11 (4th Cir. July 13, 2007) (holding that exception did not apply because questioning about a weapon in the defendant's truck occurred after the defendant had been arrested and the truck impounded), cert. denied, 552 U.S. 1032 (2007), and 128 S. Ct. 950 (2008); *United States* v. *Mobley*, 40 F.3d 688, 693 (4th Cir. 1994) (holding that exception did not apply because questioning occurred after police had arrested the defendant, determined that he was unarmed, swept the apartment, and determined that only the defendant was present), cert. denied, 514 U.S. 1129 (1995). These cases did not, as petitioner suggests, hold that immediate danger is necessary under *Quarles*; rather, they simply refused to apply the public-safety exception to questioning that occurred after the police had entirely neutralized the situation.

Conversely, courts of appeals have applied the public-safety exception to permit questioning when the police had not yet eliminated a reasonable possibility that an undiscovered weapon could pose a danger to police or the public. See *United States* v. *Liddell*, 517 F.3d 1007, 1008-1009 (8th Cir.) (officers conducting a late-night search of the defendant's vehicle had reasonable concern, after discovering one weapon hidden in the vehicle, about being harmed by mishandling other con-

cealed loaded weapons in the vehicle), cert. denied, 129 S. Ct. 627 (2008); *United States* v. *Fox*, 393 F.3d 52, 60 (1st Cir. 2004) (officer who found live ammunition during search of a suspect reasonably asked about the location of the gun accompanying the ammunition and how to unload the gun when officer was unable to do it himself), vacated on other grounds, 545 U.S. 1125 (2005); *United States* v. *Phillips*, 94 Fed. Appx. 796, 800-801 (10th Cir. 2004) (applying exception where police were about to search house of a drug dealer, and there may have been people and weapons inside), vacated on other grounds, 543 U.S. 1101 (2005).

Petitioner also cites (Pet. 10) federal district court cases that assertedly conflict with the decision below. District court decisions, however, are not precedential and do not establish conflicts warranting this Court's review. See Sup. Ct. R. 10(a). In any event, these cases are also consistent with the decision below. In *United States* v. *Salahuddin*, 607 F. Supp. 2d 930, 943-944 (E.D. Wis.), vacated *sub nom. In re United States*, 572 F.3d 301 (7th Cir. 2009), the court declined to apply the public-safety exception because the defendant was alone and handcuffed in his apartment when the police asked him about the presence of weapons, and the police had no reason to believe that any other person was in the apartment. And in *United States* v. *Rodriguez*, 931 F. Supp. 907, 911 (D. Mass. 1996), the court found the exception to be inapplicable because, by the time the police asked about weapons, the defendant had been removed from his apartment and the apartment had been "thoroughly secured."

Finally, the intermediate state appellate decisions on which petitioner relies (Pet. 10-11) similarly reaffirm that, in order for the public-safety exception to apply,

officers must have reasonable safety concerns arising from the possible presence of a weapon. See *State* v. *Strozier*, 876 N.E.2d 1304, 1311-1312 (Ohio Ct. App. 2007); *State* v. *Stephenson*, 796 A.2d 274, 280-281 (N.J. Super. Ct. App. Div. 2002) (exception may apply where gun is in unknown location in private apartment and may be accessible to third persons); *State* v. *Hendrickson*, 584 N.W.2d 774, 777-778 (Minn. Ct. App. 1998) (exception did not apply when individual suspected of stealing a gun was apprehended on the street and had no weapons on his person, and officers had no reason to believe that a gun defendant had stolen was accessible to third parties); *In re John C.*, 519 N.Y.S.2d 223, 227-228 (App. Div. 1987) (exception did not apply when officers had already secured apartment and first questioned defendant about his guilt).

In sum, the court of appeals' reliance on a reasonable need to protect against danger to the police or public on the facts of this case does not conflict with the decisions on which petitioner relies. Those courts applied the *Quarles* standard to the specific factual circumstances presented in each case, and the varying outcomes create no conflict meriting this Court's review.

c. Even if this Court wished to review the lower courts' application of *Quarles*, this case would not be an appropriate vehicle in which to do so because the application of the public-safety exception would have no impact on the ultimate outcome. As discussed pp. 16-19, *infra*, petitioner's more detailed post-warning statements admitting that he owned the gun were properly admitted. Thus, even if petitioner were correct that his pre-warning statement about the gun should have been excluded, that error would be harmless beyond a reason-

able doubt. See Pet. App. 4a-5a; *Schneble* v. *Florida*, 405 U.S. 427, 432 (1972).

2. Relying on the plurality opinion in *Missouri* v. *Seibert*, 542 U.S. 600 (2004), petitioner contends (Pet. 18-24) that the statements he made after receiving and voluntarily waiving his *Miranda* rights should have been suppressed as the fruits of his initial pre-*Miranda* statements to Detective Bevington. The court of appeals correctly held that petitioner's post-*Miranda* statements were admissible. The police did not deliberately attempt to circumvent *Miranda*, and there was no evidence that the warnings were ineffective or that petitioner's statements were involuntary. Further review is not warranted.

a. In *Oregon* v. *Elstad*, 470 U.S. 298 (1985), this Court addressed the admissibility of a warned statement given by a suspect after the police had already obtained an unwarned statement from him in violation of *Miranda*. This Court held that "[a] subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." *Id.* at 314. The Court explained that a defendant's provision of incriminating statements before being administered the *Miranda* warnings does not, in the absence of "any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will," result in such a degree of psychological coercion that any subsequent administration of the warnings will be ineffective. *Id.* at 309, 313. The Court therefore concluded that "absent deliberately coercive or improper tactics in obtaining the initial statement," an unwarned admission does not

give rise to any presumption that subsequent, warned statements were involuntary. *Id.* at 314.

In *Seibert*, the Court considered a police protocol for custodial interrogation whereby the police would deliberately delay giving *Miranda* warnings until after custodial interrogation had produced a confession, and then would lead the suspect to cover the same ground in a warned statement. 542 U.S. at 604 (plurality opinion). The plurality concluded that post-*Miranda* statements made in the context of successive unwarned and warned questioning are admissible only when "it would be reasonable to find that in th[e] circumstances the warnings could function 'effectively' as *Miranda* requires." *Id.* at 611. The plurality identified several facts present in the case that indicated that the *Miranda* warnings could not have functioned effectively: (1) the unwarned interrogation was "systematic, exhaustive, and managed with psychological skill"; (2) the warned questioning followed the unwarned questioning by only 15-20 minutes; (3) the warned questioning took place in the same location as the unwarned questioning; (4) the same officer conducted both interrogations; and (5) the officer did nothing to dispel the defendant's probable misimpression that the warned interrogation was merely a continuation of the unwarned interrogation and that her unwarned inculpatory statements could be used against her. *Id.* at 616 (plurality opinion). The plurality reasoned that, in light of these factors, the *Miranda* warnings were ineffective, because "[i]t would have been reasonable [for the defendant] to regard the two sessions as part of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before." *Id.* at 616-617 (plurality opinion).

Concurring in the judgment, Justice Kennedy provided the fifth vote for holding the post-warning statements to be inadmissible. Justice Kennedy stated that the plurality's objective test "cuts too broadly" because it would apply to both intentional and unintentional two-stage interrogations. *Seibert*, 542 U.S. at 621-622 (concurring). Instead, Justice Kennedy favored "a narrower test applicable only in the infrequent case * * * in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning." *Id.* at 622 (concurring). Absent a "deliberate two-step strategy," in Justice Kennedy's view, the admissibility of post-warning statements should be governed by *Elstad*. *Ibid.* (concurring). "If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made." *Ibid.*

b. Petitioner argues (Pet. 20-22) that this Court should grant review to clarify the holding of *Seibert* because, he asserts, there is widespread confusion in the lower courts as to how to determine whether post-warning statements are admissible when the defendant made prior unwarned statements. Petitioner is incorrect that review is warranted on that basis.

Every federal court of appeals that has decided the issue has concluded that Justice Kennedy's concurring opinion represents the holding of *Seibert*. See *United States* v. *Carter*, 489 F.3d 528, 535-536 (2d Cir. 2007), cert. denied, 128 S. Ct. 1066 (2008); *United States* v. *Street*, 472 F.3d 1298, 1313 (11th Cir. 2006), cert. denied, 551 U.S. 1138 (2007); *United States* v. *Courtney*, 463 F.3d 333, 338 (5th Cir. 2006); *United States* v. *Williams*, 435 F.3d 1148, 1157-1158 (9th Cir. 2006); *United States*

v. *Kiam*, 432 F.3d 524, 532-533 (3d Cir.), cert. denied, 546 U.S. 1223 (2006); *United States* v. *Mashburn*, 406 F.3d 303, 308-309 (4th Cir. 2005); *United States* v. *Briones*, 390 F.3d 610, 613 (8th Cir. 2004), cert. denied, 545 U.S. 1122 (2005).[3] Petitioner cites (Pet. 22) only one decision—from the Georgia Supreme Court—that held that the plurality opinion represents the holding of *Seibert*. See *State* v. *Pye*, 653 S.E.2d 450, 453 n.6 (Ga. 2007).[4] That single outlying decision does not indicate that there is widespread confusion among the lower courts meriting this Court's review.

It may be true that the analysis in this context is not as straightforward as in some other contexts when multiple opinions compose a majority of the Court. In *Marks* v. *United States*, 430 U.S. 188, 193 (1977), this Court explained that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." See, *e.g.*, *Williams*, 435 F.3d at 1157-

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[3] Three courts of appeals have declined to decide the issue. See *United States* v. *Heron*, 564 F.3d 879, 884-885 (7th Cir. 2009) (declining to decide "what rule or rules governing two-step interrogations can be distilled from *Seibert*," while noting in dicta that "it [is] a strain at best to view [Justice Kennedy's] concurrence * * * as the narrowest ground on which a majority could agree"); *United States* v. *Pacheco-Lopez*, 531 F.3d 420, 427 n.11 (6th Cir. 2008) (holding that statements should be suppressed under either standard); *United States* v. *Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir.) (holding that interrogation was constitutional under either standard), cert. denied, 549 U.S. 1065 (2006).

[4] Petitioner also relies (Pet. 21) on *State* v. *Dailey*, 273 S.W.3d 94, 107 (Tenn. 2009), but there the court found it unnecessary to ascertain the holding of *Seibert* because it found that the statements should be suppressed under both the plurality's approach and Justice Kennedy's.

1158; *Mashburn*, 406 F.3d at 308-309. Justice Kennedy's opinion does provide a narrower ground for decision than the plurality, because his rule of exclusion applies only when "the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning," *Seibert*, 542 U.S. at 622, while the plurality's rule would require an objective inquiry into the effectiveness of the warnings in all cases where there are two successive interrogations, *id.* at 611.

In cases in which an impermissible intent is actually present, however, Justice Kennedy's opinion may provide a broader ground for exclusion, as Justice Kennedy would exclude a second related statement "unless curative measures are taken before the postwarning statement is made," *Seibert*, 542 U.S. at 622, while the plurality would permit the introduction of the second statement even in the absence of curative measures, so long as the *Miranda* warnings "could function 'effectively' as *Miranda* requires," *id.* at 611-612. Nevertheless, it is difficult to identify actual litigated fact patterns in which the police harbor a subjective intent to undermine *Miranda*, as Justice Kennedy would require, but where the second warned statement would be admissible under the plurality's "effective warnings" approach but not Justice Kennedy's "curative measures" approach. Accordingly any uncertainty about the application of *Marks* in this context does not warrant this Court's intervention. That is particularly true because it is rare that courts have found an impermissible intent under Justice Kennedy's opinion in the first place, and, absent such a finding, *Elstad* remains the controlling authority.

c. Even if this Court wished to review this issue, this case would not be an appropriate vehicle in which to do so, because petitioner's post-warning statements were

plainly admissible under both Justice Kennedy's approach and the *Seibert* plurality's approach.

Petitioner acknowledges that the evidence in this case would not satisfy Justice Kennedy's rule, as there is no indication that the police deliberately employed a two-step interrogation strategy in order to undermine the *Miranda* warnings. Pet. 22-23. Rather, Detective Bevington asked petitioner only three basic questions about the presence of other individuals, guns, or drugs in the apartment. After petitioner answered, Detective Bevington did not attempt to elicit any incriminating details, or even follow up at all. C.A. App. 38-40; Gov't C.A. Br. 19; Pet. 3-4. The detective then left petitioner alone for one to two hours before questioning was resumed. *Ibid.* The evidence thus demonstrates that the officers did not structure their questioning in a concerted attempt to undermine the *Miranda* warnings by eliciting a full confession before providing the warnings.

Petitioner's statements were also admissible under the *Seibert* plurality's approach. Detective Bevington did not exhaustively question petitioner during the initial interaction or seek to establish his commission of a criminal offense. Pet. App. 10a; C.A. App. 38-39. He did not ask any questions concerning drug trafficking or gun use, nor did he even attempt to determine the ownership of the gun or drugs. The brevity of the initial questioning "reduced the likelihood" that the *Miranda* warnings were not effective when given. *United States* v. *Carrizales-Toledo*, 454 F.3d 1142, 1152 (10th Cir.), cert. denied, 549 U.S. 1065 (2006). Moreover, because petitioner revealed nothing more during the first interaction than his knowledge of the presence of a gun and drugs in the apartment that he shared with another person, see Pet. App. 10a, it cannot plausibly be argued that peti-

tioner's detailed account of his drug trafficking activities during his second interaction was motivated by his perception that he already had irretrievably inculpated himself. Cf. *Seibert*, 542 U.S. at 616 (plurality opinion) (relying on the fact that "little, if anything, of incriminating potential [was] left unsaid" in the initial, unwarned questioning). Here, "[t]he differing content of [petitioner's] first and second [statements] * * * suggests that the initial interrogation did not undermine the *Miranda* warnings." *Carrizales-Toledo*, 454 F.3d at 1152.

The remaining *Seibert* factors also weigh heavily in favor of the admissibility of the post-warning statements. First, the two interactions occurred in different locations, the first during the drive to the police office and the second at the office. C.A. App. 64; Pet. App. 10a-11a; Pet. 3-4. Second, the two interactions were separated in time. Detective Bevington returned to petitioner's residence to participate in the execution of the search warrant after delivering petitioner to the office, and the second interaction did not begin until after his return an hour or two later. C.A. App. 40-41. Third, the post-warning interrogation was conducted by a different officer (albeit in Detective Bevington's presence). *Id.* at 42, 53-55, 64. And finally, there is no evidence that, in conducting the post-warning questioning, Detective Killingsworth referred back to the initial interaction or in any way suggested that the second round of questioning was a continuation of the first. *Id.* at 59. Accordingly, "[b]ecause the questioning was broken up into two distinct sessions, the midstream *Miranda* warnings were more likely to have had their intended effect." *Carrizales-Toledo*, 454 F.3d at 1152; cf. *Seibert*, 542 U.S. at 616 ("The impression that the further questioning was

a mere continuation of the earlier questions and responses was fostered by references back to the confession already given.").

In sum, under either the plurality's approach in *Seibert* or Justice Kennedy's, the court of appeals correctly held that petitioner's post-warning statements were admissible. Further review is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2010

Supreme Court, U S
FILED
APR 13 2010
OFFICE OF THE CLERK

No. 09-740

IN THE
Supreme Court of the United States

ANTOINE HILL,
Petitioner,

v

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY BRIEF

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Rorie A Norton, Note, MATTERS OF PUBLIC SAFETY AND THE CURRENT QUARREL OVER THE SCOPE OF THE QUARLES EXCEPTION TO *MIRANDA*, 78 Fordham L Rev 1931 (2010) 3, 6

REPLY BRIEF

The government's position is extreme. They claim that no conflict exists in the lower courts on whether the public safety exception requires exigency, despite the fact that the split has been acknowledged by courts, scholars, and even the government itself just one Term ago. Br. in Opp. 8-11. They further claim that *New York v. Quarles*, 467 U. S. 649 (1984), allows any reasonable threat to the public or police—no matter how far off in time—to justify dispensing with *Miranda* warnings so long as the police "ask questions reasonably prompted by a concern for the public safety." Br. in Opp. 7. And the government fails to directly address why, in this case, the police officer continued to interrogate petitioner on the whereabouts of incriminating evidence, after petitioner responded in a way eliminating any present threat that someone else in the apartment would take control of a firearm.

In contrast to the government's extremist position, petitioner maintains that the lower courts continue to grapple with how to apply the public safety exception, and in doing so, have come to differing conclusions leading to disparate results. Further, the answer to when the public safety exception applies is dictated by *Quarles* itself—only when officers reasonably believe that a threat exists, "circumscribed by the *exigency* which justifies it," *Quarles*, 467 U.S. at 658 (emphasis added). Here, both a reasonable belief and exigency were missing when Officer Bevington decided to forego issuing the warnings this Court has long required.

With regard to the second question, the government admits that the lower courts' analysis of

Missouri v Seibert, 542 U S 600 (2004), is not as "straightforward as in some other contexts when multiple opinions compose a majority of the Court," yet the government contends that lower courts have distilled one standard for question first, warn later techniques employed by law enforcement Br in Opp 15 But the government's *ipse dixit* is no answer for the numerous courts who have noted the division and confusion over *Seibert*, nor the states who have sought certiorari on this very question The government also claims that the "brevity" of the initial questioning "reduced the likelihood" that the *Miranda* warnings were not effective when given " Br in Opp 17 The government, however, has to misconstrue the facts—and badly so—to make this claim

There is widespread confusion on whether the *Seibert* plurality or Justice Kennedy's concurrence should apply when the question first, warn later technique is applied by police and no evidence of the officer's intent in using the technique is present That alone requires this Court's intervention In addition, the first round of questioning here resulted in a comprehensive admittance of guilt, the second round of questioning was a continuation and expansion of the first confession, and there was no intervening curative measure other than officers reading *Miranda* warnings in the station house In such a case, "[i]t would have been reasonable [for petitioner] to regard the two sessions as part of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before", and thus, the questioning completely eliminated the likelihood that *Miranda* warnings were "effective " *Seibert*, 542 U S at 616–17

(plurality opinion) The Court's review therefore is unmistakably in order

A. The Circuits Are In Conflict On Whether Exigency Is Required For The Public Safety Exception To Apply.

As an initial matter, there is widespread acknowledgement that the lower courts are divided on the question of whether exigency is required in applying the *Quarles'* public safety exception *See, e g , United States v Liddell*, 517 F 3d 1007, 1012 (8th Cir 2008) (Gruender, J , concurring), *United States v Doble*, 2009 WL 567995, *2 (9th Cir Mar 6, 2009) (Pregerson, J , dissenting) (noting the tension of an intra-circuit conflict because one line of public safety cases requires exigency and the other does not), *United States v Jones*, 154 F Supp 2d 617, 628 (S D N Y 2001) (courts have taken "divergent approaches to determining the breadth of the public safety exception"), Rorie A Norton, Note, MATTERS OF PUBLIC SAFETY AND THE CURRENT QUARREL OVER THE SCOPE OF THE *QUARLES* EXCEPTION TO *MIRANDA*, 78 Fordham L Rev 1931 (2010) (describing the courts of appeals' decisions as "split," in "conflict" and in "tension") ("Norton, __"), Bradley A Dixon, Comment, A CALL TO POLICE THE MARGINS THE EIGHTH CIRCUIT'S EXPANSION OF *MIRANDA'S* PUBLIC-SAFETY EXCEPTION, 75 Mo L Rev 229 (2010) (noting split), Michael J Roth, Note, *BERKEMER* REVISITED UNCOVERING THE MIDDLE GROUND BETWEEN *MIRANDA* AND THE NEW *TERRY*, 77 Fordham L Rev 2779, 2793 n 111 (2009) (same) Even the government admitted as much last Term when they recognized the "tension" between the Eighth Circuit approach in *Liddell* and those taken by other lower

courts which require exigency *Liddell v United States*, No 08-227, Government's Brief In Opposition, at 13

The government now contends that the courts of appeals' decisions are not conflicting, because they all apply the "*Quarles* standard by asking whether there was a reasonable need to protect the police or the public from an undiscovered weapon in light of the facts presented in each case " Brief in Opp 8 But that is not the quarrel here Of course, the presence of a threat is required by all the circuit courts before the public safety exception is applied *Quarles*, however, does not merely require the presence of a threat at any point in the future, it requires an imminent threat And that immediacy requirement is not required by *all* lower courts when applying the exception

Next, the government attempts to explain away the conflict by confining *all* lower court applications of the exception to instances where "the police had already eliminated any reasonable possibility that someone other than themselves could gain access to an unrecovered weapon " Br in Opp 8 Upon close inspection, this distinction proves illusory given the Eighth and First Circuits' consistent application of the public safety exception well after a scene is secured from outsiders *See, e g , United States v Liddell*, 517 F 3d 1007, 1008–10 (8th Cir) (applying the exception due to the risk of officers "mishandling unknown firearms" despite the fact that the defendant had been arrested late at night, placed in the rear of a patrol car, and determined to be unarmed and alone), *cert denied*, 129 S Ct 627 (2008), *United States v Luker*, 395 F 3d 830, 831–32,

835 (8th Cir 2005) (upholding the exception even though three officers had arrested the defendant, no other people were in the area or the car, and there was no actual evidence of a firearm to prompt the questioning), *United States v Fox*, 393 F 3d 52, 56–57, 60 (1st Cir 2004) (holding that the exception applied to questions asked after the defendant had been patted-down with all weapons and paraphernalia removed from his person, subsequently arrested, and placed in the front of the police cruiser)

The Eighth and First Circuits' rationale for applying *Quarles* in those cases stands in stark contrast to other courts confronted with essentially the same facts, yet flatly refusing to apply the public safety exception *See, e g , United States v Raborn*, 872 F 2d 589, 592, 595 (5th Cir 1989) (court declined to apply the exception, even though officers had full knowledge there was an as-yet-undiscovered weapon, because exigency had expired once the defendant was arrested and the vehicle fully secured), *United States v Mobley*, 40 F 3d 688, 690, 693 (4th Cir 1994) (exception not applied despite the reasonable suspicion of officers that an undiscovered weapon was present in conjunction with suspected cocaine trafficking, because the defendant had already been arrested and found to be alone after a comprehensive sweep of the premises)

What the lower court conflict boils down to is, on the one hand, courts that "broadly apply the *Quarles* exception to inherently dangerous circumstances

devoid of immediacy or actual evidence of a threat,"[1] and on the other, courts holding that "the public safety exception is only warranted where officers have actual knowledge of an imminent threat to public safety "[2] Norton, *supra*, at 1948

Contrary to the government's assertions, the lower court conflict is real, deep, and entrenched Only this Court can rectify the division of authority The Court should therefore grant review

B: The Government's Standard For Applying The Public Safety Exception And The Lower Court's Application Here Departs From *Quarles*.

The government contends that *Quarles* does not necessitate an immediate threat, and instead only requires that "police ask questions reasonably prompted by a concern for the public safety " Brief in Opp 7 (quotation and citation omitted) The government's lone support for this contention is the *Quarles* dissenting opinion describing the *Quarles*

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[1] *See, e g* , Pet 8–14, *United States v Brady*, 819 F 2d 884, 887–88 (9th Cir 1987), *United States v Are*, 590 F 3d 499, 505 (7th Cir 2009), *United States v Jones*, 567 F 3d 712, 716–17 (D C Cir 2009), *Mackrill v State*, 100 P 3d 361 (Wyo 2004)

[2] *See, e g* , Pet 8-14, *United States v DeJear*, 552 F 3d 1196, 1202 (10th Cir 2009), *United States v Williams*, 483 F 3d 425, 428 (6th Cir 2007), *United States v Estrada*, 430 F 3d 606, 612 (2d Cir 2005), *Commonwealth v Loadholt*, 2010 WL 1209995 (Mass 2010), *People v Mohabir*, 2010 WL 1254548 (N Y Sup 2010)

factual scenario as one lacking immediate danger Id at 6-7 Both the quality and quantity of the government's support is telling on their argument as a whole

First, the *Quarles* majority described the facts and exception in terms much different from the government *See, e g , Quarles,* 467 U S at 657 ("The police in this case, in the very act of apprehending a suspect, were confronted with the *immediate necessity* of ascertaining the whereabouts of a gun "), *id* at 657–58 ("We decline to place officers such as Officer Kraft in the untenable position of having to consider, *often in a matter of seconds*, whether it best serves society for them to ask the necessary questions without the *Miranda warnings* "), *id* at 655 ("In a *kaleidoscopic* situation such as the one confronting these officers, *spontaneity* rather than adherence to a police manual is necessarily the order of the day ") (emphasis added)

Second, the government's argument that officers may ask questions without *Miranda* anytime they are concerned for public safety conveniently omits the limitation the *Quarles* Court attached to the exception—that it is "circumscribed by the *exigency* which justifies it " *Id* at 657 (emphasis added), *see also Berkemer v McCarty*, 468 U S 420, 429 n 10 (1984) (noting that "one exception" to the line of *Miranda* decisions is the public safety exception, which applies "when the police arrest a suspect under circumstances presenting an *imminent danger* to the public safety, they may without informing him of his constitutional rights ask questions essential to elicit information necessary to neutralize the threat to the public") (emphasis added) The *Quarles* Court

included this exigency requirement precisely so as to reign in the public safety exception, ensuring that it remains a "narrow exception" over time *Quarles*, 467 U S at 655

Petitioner's case is a paradigmatic example of the exception expanded in a way to swallow the rule of *Miranda* Several police detectives had conducted surveillance on his apartment, waiting for him to exit so they could carry out a search warrant Suppression Hearing, at 7 ("Supp __") Once petitioner exited the apartment he was arrested and interrogated without *Miranda* warnings There was no immediate danger to the public or police, and in fact, the police *waited approximately one hour* for Detective Bevington to finish the interrogation before they searched the apartment Supp 17 At best, the situation presented a threat that someone else may have remained inside the apartment, although that threat was unlikely given the multiple hours of surveillance and the fact it was midday Supp 13 But that threat (at least as far as questioning petitioner was concerned) was eliminated when petitioner responded that the apartment was empty Supp 8 There was no need for further questioning on the location of a firearm and drugs beyond that for a need to acquire evidence and a confession—a fact Detective Bevington all but admitted at the suppression hearing Supp 14 In such cases, the exigency which justified the public safety exception had vanished and the police were required to give the simple expedient of reading petitioner his constitutionally-endowed *Miranda*

rights [3] For this reason, the Court should grant review

C: The Lower Courts Are Divided On Which *Seibert* Standard To Apply When Police Use The Question First, Warn Later Technique But No Evidence Of Deliberate Intent Exists.

The government maintains that lower courts are not divided on whether to apply the standard elucidated by the *Seibert* plurality and Justice Kennedy's concurrence in that case Br in Opp 14–15 The government's argument is misplaced

While the government is correct that the majority of federal circuits have employed Justice Kennedy's concurrence, Br in Opp 14–15, several others have acknowledged that "it [is] a strain at best to view [Justice Kennedy's] concurrence as the narrowest ground on which a majority could agree" *United States v Heron*, 564 F 3d 879, 884–85 (7th Cir 2009), *see also, United States v Pacheco-Lopez*, 531 F 3d 420, 427 n 11 (6th Cir 2008) (applying both standards), *United States v Carrizales-Toledo*, 454 F 3d 1142, 1151 (10th Cir) (same), *cert denied*, 549 U S 1065 (2006), *State v Dailey*, 273 S W 3d 94, 107 (Tenn 2009) Given the Court's honorable goal of producing judicial economy, the fact that lower courts are wading through both standards when

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[3] The government's argument on potential vehicle problems with regard to question one is addressed as part of question two because if the Court decides in petitioner's favor on the second question, there is obviously no harmless error on question one

deciding the issue usually signals that this Court must revaluate its approach

In addition, several state courts—in direct conflict with federal circuits—have squarely held that the *Seibert* plurality must guide when the question first, warn technique has been applied *State v Pye*, 653 S E 2d 450, 453 n 6 (Ga 2007), *State v Ferris*, 849 N E 2d 985 (Ohio 2006) And one recent state court decision applied Justice Kennedy's concurrence to an instance where no evidence of a deliberate police practice existed *State v Navy*, 688 S E 2d 838, 842 (S C 2010) Moreover, petitioner is not the first to request certiorari over the lower court confusion of *Seibert* In the past two Terms, the States of Ohio and Texas have both noted the murky area of law and sought this Court's guidance *See Ohio v Ferris*, No 06-464, Petition for Writ of Certiorari, *Texas v Martinez*, No 08-1159, Petition for Writ of Certiorari

The lower courts have struggled with *Seibert*, coming to differing conclusions while employing an inordinate amount of judicial energy The confusion over *Seibert* can only be ended by this Court's guidance

D: Had The Court Below Employed The *Seibert* Plurality Standard, The Second Warned Statements Would Have Been Suppressed.

In arguing that the second warned statements were admissible, the government misconstrues relevant facts and the factors used to determine whether *Miranda* warnings are effective Br in Opp 17–19

First, the government claims that petitioner's responses to the first unwarned interrogation revealed nothing more "than his knowledge of the presence of a gun and drugs in the apartment that he shared with another person." Br. in Opp. 17. Petitioner, however, did not merely answer as to the location of the firearm and drugs in the residence. Rather, petitioner gave several inculpatory statements on heroin dealing, the exact subject for which he was later questioned and indicted. Supp. 8, 15, 24–25. This factor is relevant in determining whether the *Miranda* warnings issued between interrogations were effective. *Seibert*, 542 U.S. at 616.

Second, the government contends that the first and second questioning occurred in "different locations." Br. in Opp. 18. That was not, however, the testimony of Detective Bevington who stated that the first questioning occurred in the "office." Supp. 7. Next, the government claims that a one to two hour break between the first and second interrogations weighs heavily in favor of admissibility on the second statements. But this Court has held in other contexts that a similar time period did not make the second questioning an act of free will sufficient to purge the primary taint from the first questioning. *See Brown v. Illinois*, 422 U.S. 590, 604 (1975), *Dunaway v. New York*, 442 U.S. 200, 218 (1979).

Finally, the government contends that since a different officer read petitioner *Miranda* warnings at the stationhouse, and because that detective did not refer back to the initial interaction, the questioning was distinct and the *Miranda* warnings likely had their affect. Br. in Opp. 18. The former factor is irrelevant given that Detective Bevington was

present and active in both rounds of questioning And with regard to the latter, the government fails to mention that the second questioning covered the exact same ground as the first—petitioner's drug dealing, drug possession and firearm possession Pet App 4a (court of appeals labeled the statements "essentially identical"), Supp 24 (Detective Killingsworth first asked petitioner to elaborate on the firearm located in the apartment) In fact, the second questioning merely expounded on the first, a factor the *Seibert* plurality found persuasive on the question of whether *Miranda* warnings were effective *Seibert*, 542 U S at 615

Given the factual scenario surrounding the first and second questioning, this case presents the ideal vehicle in which to clear up the *Seibert* confusion And since the circumstances dictate that the *Miranda* warnings were not effective, the second statements (like the first), should have been suppressed The Court's review is therefore warranted

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted

Respectfully submitted,

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